

F. M. S. REPORTS.

[ORIGINAL CIVIL JURISDICTION]

POYSER, C.J. & GORDON-SMITH, J.

January 16, 1940.

IN RE AN ADVOCATE & SOLICITOR.[SELANGOR REFERENCE UNDER THE ADVOCATE
& SOLICITORS ENACTMENT]

Solicitor—Advocates & Solicitors Enactment (Cap. 16)—Advocate & Solicitor—obligations regarding client's moneys—professional misconduct—application to suspend.

Proceedings for an order calling upon an advocate and solicitor to show cause why he should not be suspended for failing to keep a separate banking account of client's moneys.

Held, the effect of English authorities is that mere non-payment of money due to a client is not professional misconduct unless there is a deceit or fraud and that when such deceit, fraud or any misappropriation is negated the mere non-payment to the client or intermingling of the client's and the solicitor's own money does not constitute professional misconduct justifying the suspension of a Solicitor. It is extremely reprehensible conduct on the part of any Advocate and Solicitor who obtains money for distribution to the beneficiaries of an estate to retain that money in his possession for 12 months without taking any steps whatsoever to distribute the same to those entitled, even and although there may be costs or fees due to him in regard thereto.

Advocates and Solicitors are under the same obligations as those appertaining to Solicitors in England in the conduct of that branch of professional work. It is a moral duty to keep strict and accurate accounts not only of their own moneys but also of their clients' moneys and to pay at once any client's moneys received by them into a separate account at a Bank. And although not obligatory, it is also a desirable practice that such accounts should be audited annually by a firm of accountants.

Cases referred to:—

- (1) *Cheese v. Keen*, (1908) 1 Ch. 245.
- (2) *Guilford v. Sims*, (1853) 180 E.R. 1242.
- (3) *Incorporated Law Society & Four Solicitors, In the Matter of*, 1 T.L.R. 672.
- (4) *Matthews v. Wallwyn*, 31 E.R. 62.
- (5) *Solicitor, In re a*, (1895) 11 T.L.R. 169.
- (6) *Solicitor, Re a*, 28 T.L.R. 59.
- (7) *Sparks, Re*, (1864) 144 E.R. 291.
- (8) *Solicitor, In re*, (1868/1869) 4 Ch. A.C. 43.

REFERENCE.

W. G. W. Hastings for respondent.

The Committee has not proved fraudulent misappropriation and any finding short of that does not justify the Court in suspending the Solicitor. (*In re a Solicitor*⁽⁵⁾. *Re Sparks*⁽⁷⁾. *Guilford v. Sims*⁽³⁾).

There are no rules in this country such as exist in England. Not to keep proper accounts is reprehensible but would not justify the Court in suspending the Solicitor in this case.

In the absence of fraud there can be no professional misconduct.

(*In the matter of the Incorporated Law Society and Four Solicitors*⁽³⁾, particularly Denman, J., at page 673, and Wills, J., at page 676).

F. G. Charlesworth for Bar Committee.

Certain of the findings (Nos. 3, 4, 5 and 7 set out in the judgment) show that the practitioner has done acts which would render him liable to be disbarred or suspended or struck off the Rolls of the Court if a Barrister or Solicitor in England. Section 5 (h) of the Advocates and Solicitors Enactment applies.

As to the finding that the practitioner did not keep a separate banking account of clients' moneys *see re a Solicitor*⁽⁶⁾.

There has been no express finding of misappropriation, but the practitioner has not shown that he had the clients' money in hand at all material times.

As to the finding that the practitioner did not keep office books of account, in England, prior to legislation to that effect, a Solicitor was bound by the Common Law to keep proper accounts. (*Matthews v. Wallwyn*⁽⁴⁾ and *Cheese v. Keen*⁽¹⁾).

The facts sufficiently appear from the Judgment.

Cur. Adv. Vult.

Poyser, C.J. and Gordon-Smith, J.—This matter came before the Court, in the first instance, by way of *ex parte* motion by the Bar Committee, for an order calling upon the Advocate to shew cause why he should not be suspended.

Such order was made returnable for the 16th January and served upon the Advocate together with copies of the supporting affidavit and of the record of enquiry held by the Bar Committee.

At the hearing of the substantive application, Mr. Hastings appeared for the Advocate and Mr. Charlesworth for the Bar Committee and at the conclusion of Counsel's addresses the Court discharged the order, without making any order as to costs, and intimated that a considered written judgment would be given at a later date.

The matter originated by a formal complaint by letter dated the 11th July, 1939, to the Secretary of the Bar Committee by a Malay, complaining that whereas money had been withdrawn by the Advocate from Court in March, 1938, he was unable to obtain what was due to him by the Advocate.

Subsequently, and in accordance with section 12 of the Enactment, the Bar Committee held a full enquiry and as a result of the findings, made application to the Court, in accordance with section 6 of the Enactment.

In these findings the Committee had come to the final conclusion that the acts of the Advocate, which were specifically set out earlier in the findings, brought him within section 5 of the Enactment, but it was not stated which particular paragraph of section 5 it was alleged that the Advocate had contravened. This, in fairness to the Advocate, should have been done. Mr. Hastings argued the matter on the assumption that it was paragraph (b) which reads as follows:—

“that such person has been guilty of fraudulent or grossly improper conduct in the discharge of his professional duty”

and he quoted to us the following English authorities:

In re a Solicitor⁽⁵⁾.

In re Sparks⁽⁷⁾.

Guilford v. Sims⁽²⁾.

In re a Solicitor⁽⁸⁾.

In re the Law Society⁽³⁾.

In re a Solicitor⁽⁶⁾.

Hailsham Vol. 31, para. 321 at p. 299.

The effect of these authorities is that mere non-payment of money due to a client is not professional misconduct unless there is a deceit or fraud and that where such deceit, fraud or any misappropriation is negatived, the mere non-payment to the client or intermingling of the client's and the Solicitor's own moneys has not, so far, constituted professional misconduct justifying the suspension of a Solicitor.

On the other hand Mr. Charlesworth submitted that the acts of the Advocate as found by the Committee brought him within paragraphs (g) and (h) of section 5, which read as follows:

“(g) that such person allows any clerk or other unqualified person to undertake or carry on legal business in his name, such other person not being under such direct and immediate control of his principal as to ensure that he does not act without proper supervision; or

(h) that such person has done some other act which would render him liable to be dis-barred or barred or suspended or struck off the Rolls of the Court, if a barrister or solicitor in England.”

The findings of the Bar Committee were, briefly, to the following effect:

- (1) & (2) That on the 11th March, 1938, the Advocate obtained out of Court a sum of \$691.36 for distribution between a brother and two sisters, the brother's share being \$245.68. This brother was the complainant in this matter.
- (3) That the Advocate kept no separate Banking Account of clients' moneys and paid this sum into his own personal account.
- (4) That the Advocate kept no office account books other than a receipt book.
- (5) The Committee was not satisfied that there was at all times a sum sufficient to meet the payment of this sum of \$691.36 (i.e., in the Advocate's own personal account).
- (6) That no proper record of correspondence in reference to the matter was kept.
- (7) The Committee was not satisfied that the Advocate made any effort to get in touch with his clients with reference to the sums due to them, until the 9th March, 1939 (i.e., after he had been in possession of the money for practically 12 months).
- (8) That the Advocate was entitled to tax a bill of costs in respect of the moneys received out of Court but that at the date of the enquiry (15th September, 1939) such bill had not even been prepared.
- (9) That the Advocate left the affairs of his clients to an unqualified person who was not properly supervised.
- (10) That he handed over \$600 of the said sum to this unqualified person in trust for and to be paid to his clients. But this was after the complaint had already been lodged with the Bar Committee.

Other facts which appear in evidence, both for and against the Advocate are as follows:

The Advocate was called to the Bar in England in 1929 but did not practice until he came to Malaya in 1933 and he was admitted here in January, 1934. He then went into partnership with another young Advocate at Ipoh which partnership was dissolved in 1937 when the Advocate took over the whole business. Up till then there had been a separate clients' account but this was closed and thereafter he did not keep separate accounts for his own personal use and the use of his office or for his clients' moneys. Moreover, his wife had authority to draw on this personal account into which clients' money was paid.

He was not prepared to produce a Bank Certificate to the effect that at the material times this account was not below \$690.

In February 1939 the Advocate apparently came to Kuala Lumpur and assisted another Advocate, leaving the affairs of his office at Ipoh to be wound up by his late clerk. So far as the collection of outstanding accounts is concerned, we see no objection to this, nor to the distribution of moneys due to clients, if the Advocate could rely on the integrity of the clerk but without supervision this would be extremely undesirable.

Mr. Charlesworth frankly stated that he did not press the findings of the Committee in regard to paragraph (g) of section 5 and in view of this, and of the facts, we agree that a serious view need not be taken of the findings in this respect.

The more serious charge is that under paragraph (h), and in this respect Mr. Charlesworth relied more specifically on the findings of the Committee contained in paragraphs 3, 4, 5 and 7.

Firstly, as regards the keeping of accounts. In England there was a common law duty to keep accounts of clients' money had and received and paid out and in 1933 provisions were made for Rules being made in regard thereto (Solicitors Act 1933). Although locally no such duty has been specifically enacted yet it is provided in section 9 of the Enactment that a client can sue a Solicitor for a cash account and an order may be made for delivery of the same or a list of the moneys or securities held by the Solicitor on behalf of his client. Except for a receipt book, the Advocate admittedly kept no accounts whatsoever, either of clients' moneys or his own, or of office expenses.

Rules, under the Solicitors Act 1933, in regard to the keeping of accounts by Solicitors came into force on the 1st January, 1935, and by such rules it is obligatory (*inter alia*) to distinguish in such books of account, money received from or on account of and money paid to or on account of *each* client. A Solicitor is also required to keep a separate banking account and to pay into it moneys received on behalf of his clients.

Other stringent provisions are included in these Rules in relation to the keeping of accounts of the clients' money and for a contravention of such Rules, the Solicitor concerned is liable to be struck off the Rolls or be suspended or incur a less severe penalty.

As regards the findings in paragraphs 3 and 4, there was no dispute as to these facts, and as regards

that in paragraph 5, this was a matter of inference from the facts, in drawing which the Committee was fully justified. It is true that there is no specific finding to the effect that misappropriation had actually taken place, nor is there conclusive evidence to support such a finding, but the circumstances, and the inferences to be drawn therefrom, are extremely strong.

As to the finding in paragraph 7, it is clear that it is extremely reprehensible conduct on the part of any Advocate who obtains moneys for distribution to the beneficiaries of an estate, to retain that money in his possession for 12 months without taking any steps whatsoever to distribute the same to those entitled, even and although there may be costs or fees due to him in regard thereto. It is all the more reprehensible when such beneficiaries are ignorant, illiterate and poor Asiatics.

The Court considers that it has dealt leniently with the Advocate but it did so for the reason that he is young and of fairly recent call to the Bar and apparently has never had any training in or experience of the practice and procedure of a well conducted Solicitor's office, either in England or locally. Moreover the Court is of the opinion that there was no proof of any intent to defraud the clients of their money.

It should, however, be clearly understood by Barristers, young and old, experienced or otherwise, who have been called to the Bar in England that, in practising their profession in a Territory where the two branches of the profession are fused, they are under the same obligations as those appertaining to Solicitors in England in the conduct of that branch of professional work.

It is, and has been, a moral duty, always carried out by any reputable firm of Solicitors, to keep strict and accurate accounts not only of their own moneys but also of their clients' moneys and to pay at once any client's moneys received by them into a separate account at a Bank. And although not obligatory, it is also a desirable practice that such accounts should be audited annually by a firm of accountants.

This Court desires to intimate that a strict observance of these obligations is necessary and a serious view will be taken of any failure so to do, which is brought to its notice.

Order discharged. No order as to costs.